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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JEAN LUC TROUILLY, FREDDY DESBROSSES,  
DENIS BONNOT, and CHRISTIAN MELIN

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Appeal 2010-012036  
Application 11/461,963  
Technology Center 3700

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Before: PHILLIP J. KAUFFMAN, ANNETTE R. REIMERS, and  
MITCHELL G. WEATHERLY, *Administrative Patent Judges*.

WEATHERLY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from the decision of the Examiner rejecting claims 1, 2, 5, 6, 8, 10-12, and 14-21. Claims 3, 4, 7, 9, and 13 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part.

The claims are directed to a flexible container or bag for storing medical products. Claims 1 and 18, reproduced below, are illustrative of the claimed subject matter:

1. A flexible container for storing medical products comprising:

a) a plurality of adjacent chambers comprising a first chamber positioned at one lateral end of the container, a second chamber positioned at an opposite lateral end of the container and at least one additional chamber positioned between the first and second chambers;

b) a first frangible barrier separating the first chamber from the at least one additional chamber and a second frangible barrier separating the second chamber from the at least one additional chamber;

c) at least one port located at one end of the container; each port providing fluid communication with a different one of the first, second and at least one additional chambers;

d) a flap defining outwardly curved borders of upper ends of the first chamber and second chamber and defining an inwardly curved border of an upper end of the additional chamber; and

e) a longitudinal length of the at least one additional chamber being substantially less than at least one of a longitudinal length of the first and second chamber, each of the first and second frangible barriers being separably openable without the other of the first and second frangible barriers being opened when a corner of the flap is rolled.

18. A flexible multilayer bag for storing and admixing medical products comprising:

a) top, bottom, first and second lateral sides;

b) a first chamber, a middle chamber, and a third chamber, the middle chamber having a longitudinal

length that is from about two-thirds to about three-quarters of longitudinal lengths of the first and third chambers;

c) a first frangible barrier separating the first and middle chambers and a second frangible barrier separating the middle and third chambers;

d) a flap defining straight borders of upper ends of the first chamber, middle chamber and third chamber; and

e) at least two ports located at the bottom side, each port providing access to a different one of the first, middle, and third chambers wherein the first, middle and third chambers are arranged such that rolling the bag from the top side allows selective activation of one of the first and second frangible barriers without activating the other of the first and second frangible barriers.

#### REJECTIONS

Appellants seek our review of the following rejections:

1. Claims 1, 2, 5, 6, 8, 10-12, 14-17, and 21 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. 6,319,243 B1 issued November 20, 2001 to Becker (“Becker”).<sup>1</sup> Ans. 3-4.
2. Claims 18-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Becker. Ans. 4-5.

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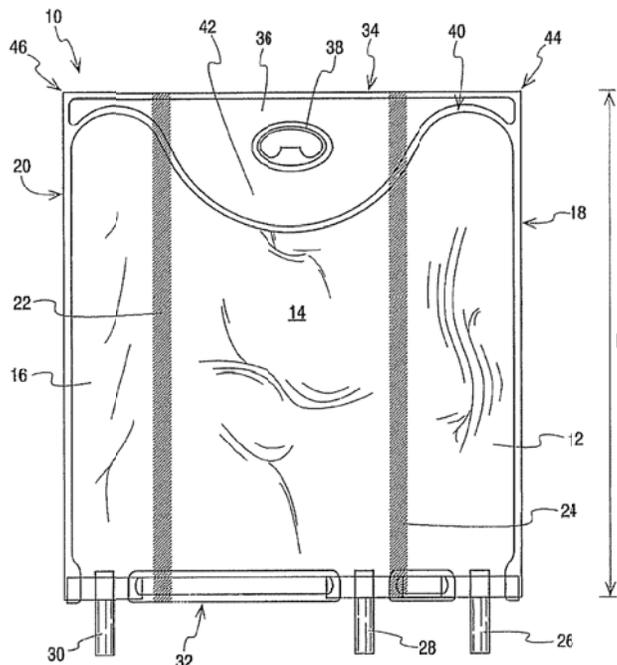
<sup>1</sup> Although Appellants list claim 3 as subject to this ground of rejection, it is not, because it is cancelled. *See* App. Br. 9, 14; Ans. 2-3; Office Action dated Dec. 2, 2009 at 2.

OPINION

*Anticipation of claims 1, 2, 5, 6, 8, 10-12, 14-17, and 21*

Independent claims 1, 12, and 21 are directed to a “flexible container for storing medical products.” While the language of each claim differs, the claims substantially recite a three-chambered container in which the middle chamber is shorter than at least one of the two laterally located chambers.

Appellants’ Figure 1, reproduced below, illustrates such a container.



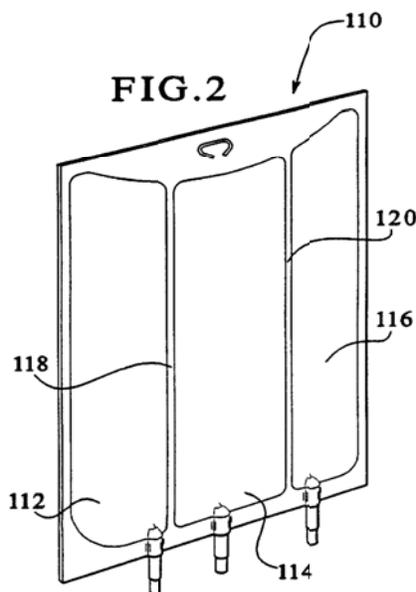
*Fig. 1*

Appellants’ Figure 1 illustrates an exemplary container as recited in independent claims 1, 12, and 21 with three chambers (12, 14, 16) and two selectively breakable seals (22, 24).

The chambers are separated by seals (frangible barriers) that can be selectively broken by rolling the top of the container either (1) from one of the corners (claims 1 and 12) or (2) while simultaneously squeezing one of the chambers (claim 21). All three claims require that the longitudinal

length of the middle chamber is “substantially less” than the length of at least one of the side chambers.<sup>2</sup>

Appellants argue for patentability of independent claims 1, 12, and 21 on substantially the same grounds. Namely, that Becker fails to describe a middle chamber that is substantially shorter than at least one of the side chambers. App. Br. 16-17. The Examiner finds that Becker describes a container that meets all structural limitations recited in independent claims 1, 12, and 21. Ans. 3-4 (citing Becker, Figure 2 (which is reproduced below)).



Becker’s Figure 2 illustrates a three-chambered container in which two peelable seals (118, 120) separate the chambers (112, 114, 116) from each other and in which the middle chamber 114 is generally shorter than the adjacent side chambers (112, 116).

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<sup>2</sup> Claim 12 recites substantially the same limitation by requiring that the “hanger portion” (e.g., “hanger portion” or “flap” 36 shown in Figure 1) extends from the top towards the bottom of the container “a substantially greater distance with respect to at least the [middle] chamber than any of the other of the [side] chambers.”

The Examiner also finds that because Becker discloses the structure recited in claims 1, 12, and 21, Becker's "container is capable of activating one the first and second frangible barriers/peelable seals (118, 120) before activating the other barriers/seals by initiating rolling the Becker et al. container at one of the corners of the first end of the container and proceeding diagonally across the container." Ans. 4. We also note that Becker expressly discloses that "[t]he peelable seals allow for the selective opening of the chambers to allow for the selective mixing of the liquids contained therein." Becker, col. 5, ll. 25-27. The Examiner indicates, and we agree, that the claims do not require that the middle chamber be shorter than the entire length of at least one of the side chambers. Ans. 5-6.

Appellants argue in response that the recitation of "substantially less" in claims 1 and 21 and "substantially greater distance" in claim 12 distinguish these claims from the container illustrated in Becker's Figure 2. Reply Br. 2-3. Appellants contend that a skilled artisan understands "substantially" as claimed to mean "considerable in value, degree, amount or extent." *Id.* at 3 (citing American Heritage Dictionary of the English Language, Fourth Edition, Houghton Mifflin Company). Appellants then attempt to quantify "considerable in value" by referring to the Specification, which discloses multi-chambered containers in which the middle chamber is "about two-thirds to about three-quarters" of the length of "either or both side chambers." Reply Br. 3. The Specification describes this range of length ratios as being desirable. *See, e.g.*, Spec., para. [0044]. However, independent claims 1, 12, and 21 do not recite these ratios. The Federal Circuit recently reiterated the well-established principle that "it is not proper to import from the patent's written description limitations that are not found

in the claims themselves.” *Flo Healthcare Solutions, LLC v. Kappos*, 697 F.3d 1367, 1375 (Fed. Cir. 2012). Therefore, we decline to import this range of ratios from the Specification into claims 1, 12, and 21.

Appellants also argue that the Examiner may not use Becker’s Figure 2 as a source of teaching that the middle chamber is shorter than the side chambers because “patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.” Reply Br. 3-4 (citing *Hockerson-Halberstadt, Inc. v. Avia Group Int’l*, 222 F.3d 951, 956 (Fed. Cir. 2000)). We agree that Becker does not indicate that its figures are drawn to scale. However, even when patent drawings are not drawn to scale, they may nevertheless be used to establish relative sizes and relationships between the various components which are clearly depicted in those drawings. *See, e.g., Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1565 (Fed. Cir 1991). The Examiner merely relies on Figure 2 for its description of the relative sizes and relationships among the three chambers shown in the figure. The Examiner does not rely on “precise proportions” shown in Becker’s Figure 2. Instead, the Examiner finds that the figure discloses a middle chamber that is shorter than the side chambers. We agree that Becker’s Figure 2 discloses this relationship to a skilled artisan, and thus the Examiner’s reliance on the figure is permitted. *In re Aslanian*, 590 F.2d 911, 914 (C.C.P.A. 1979).

For the reasons expressed above, we agree with the Examiner that the broadest reasonable interpretation of claims 1, 12, and 21 reads on the container illustrated in Becker’s Figure 2 and discussed in Becker’s written description. Appellants do not argue separately in support of any claim

depending from independent claims 1, 12, and 21. App. Br. 17; Reply Br. 5. Therefore, we affirm the Examiner's rejection of claims 1, 2, 5, 6, 8, 10-12, 14-17, and 21 as anticipated by Becker.

*Obviousness of claims 18-20 over Becker*

Independent claim 18 recites that the middle chamber is "from about two-thirds to about three-quarters" as long as the first and third side chambers. Independent claim 20 recites that the length of the second chamber differs from the length of each of the first and third chambers, respectively "by a degree of about twenty five percent to about thirty three percent." The Examiner recognizes that Becker does not sufficiently disclose the bags recited in independent claims 18 and 20 to warrant a rejection under section 102. Ans. 8. However, the Examiner finds that Becker's Figure 1 "shows a chamber (16) having a longitudinal length that is from about two-thirds to about three-quarters of longitudinal lengths of the two other chambers (12, 14)." *Id.* However, Becker's short chamber 16 is not positioned between the other two chambers (12, 14). *Id.* Nonetheless, the Examiner concludes that a skilled artisan would have considered it obvious to reposition chamber 16 to a location between the longer chambers (12, 14), because Becker's Figure 2 suggests such an arrangement and "it has been held that rearranging parts of an invention involves only routine skill in the art."<sup>3</sup> *Id.* at 8-9. The Examiner further found that the modified

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<sup>3</sup> Claim 20 does not require that the shortest chamber be the middle chamber. Nor does the claim require that all three chambers be different lengths. Instead, all that is required is that a first chamber differs in length from a second chamber, and the second chamber differs from the third. When a first length merely differs from a second length, either the first or the second length may be the shorter of the two. This series of requirements

bag of Becker's Figure 1 meets the claimed functional requirement of selectively opening either one of the seals between the chambers without opening the other by rolling the modified bag from one of the top corners. *Id.* at 9.

Appellants argue that the Examiner erred in finding that Becker's Figure 1 discloses the claimed length ratios of claims 18 and 20. Reply Br. 6-7. Appellants contend that the Examiner improperly relied on Becker's Figure 1 to teach the claimed length relationships (Reply Br. 7), because "it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue." Reply Br. 4 (quoting *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956, (Fed. Cir. 2000)).

The Federal Circuit applied the principles of *Hockerson* in a later case even more relevant to the case before us. *Nystrom v. TREX Co., Inc.*, 424 F.3d 1136 (Fed. Cir. 2005). In *Nystrom*, an accused infringer relied upon a computer model generated from Figure 3 in a prior art patent ("Zagelmeyer") to prove anticipation of Nystrom's claim 18 directed to a wooden plank with a convex top surface, which recited in pertinent part:

said convex top surface being manufactured to have a radius of curvature with a slightly rounded or curved configuration extending across the top surface from one side edge to the other, *defining a difference in thickness between the longitudinal centerline and the opposite side edges, with the*

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encompasses an arrangement such as the one shown in Becker's Figure 1. Therefore, we determine that the Examiner need not offer rationale for rearranging the position of the chambers shown in Becker's Figure 1 in connection with claim 20.

*ratio of said difference in thickness to the width of the board being about 1:40.*

*Nystrom*, 424 F.3d at 1148 (emphasis in original). A Trex employee carefully measured Zagelmeyer's Figure 3, which illustrated a plank with a convex top surface. The Trex employee used those measurements to generate a computer model of the plank to establish that the plank had a relevant thickness ratio of 1:39 or 1:37. *Id.* Based on the computer model, the district court concluded that Zagelmeyer anticipated claim 18. The Federal Circuit reversed the district court because "the district court erred in determining invalidity based on evidence improperly derived from a patent drawing" in violation of the principles of *Hockerson* and *In re Wright*, 569 F.2d 1124, 1127 (C.C.P.A. 1977) (rejecting PTO's reliance on drawings not to scale to find that prior art taught "chime length of roughly ½ to 1 inch for a whiskey barrel"). *Nystrom*, 424 F.3d at 1149.

Appellants correctly point out that Becker contains no written description of the length of chamber 16 in comparison to the lengths of chambers 12, 14. Reply Br. 7. We further agree with Appellants that Becker fails to disclose that its Figures are drawn to scale. *Id.* The Examiner thus relies solely upon Becker's Figure 1 for his finding that Becker teaches the length relationships of independent claims 18 and 20. In doing so, the Examiner errs in the same way that the district court erred in *Nystrom*. Therefore, we reverse the rejection of claims 18-20 under § 103(a) as obvious over Becker.

DECISION

For the reasons stated above, we:

1. AFFIRM the Examiner's rejection of claims 1, 2, 5, 6, 8, 10-12, 14-17, and 21 under 35 U.S.C. § 102(b) as anticipated by Becker; and
2. REVERSE the Examiner's rejection of claims 18-20 under 35 U.S.C. § 103(a) as obvious over Becker.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART

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